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Changing the Law in Child Abuse and Neglect Proceedings: An Improvement on Improvement Periods

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CHANGING THE LAW IN CHILD ABUSE AND NEGLECT PROCEEDINGS: AN IMPROVEMENT ON IMPROVEMENT PERIODS?

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I. INTRODUCTION

Courts have often debated what rights are fundamental in American society. In this debate, courts have long held that the right to bear and raise children must be considered one of an individual's basic fundamental rights.¹ This right is so basic that many parents take it for granted. The children who are raised by these parents must be protected because children also have basic fundamental rights recognized by the West Virginia Supreme Court.² Children have "a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement."³

In an ideal society, the parental rights and the rights of the child would always co-exist in harmony. Unfortunately, all too often they do not.⁴ The rights of

¹ See *id.*; see also *State ex rel. W. Va. Dept. of Human Services v. Cheryl M.*, 356 S.E.2d 181, 183 (W. Va. 1987); *Syl. Pt 1, In re Willis*, 207 S.E.2d 129, 130 (W. Va. 1973) ("In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.").

² See *State ex rel. Amy M. v. Kaufman*, 470 S.E.2d. 205 (W. Va. 1996).

³ *Id.* at 211-12.

⁴ See Catherine D. Munster, *Child Maltreatment in West Virginia: The Comprehensive State Remediation Model and the Court Improvement Project Part I*, 12 W. VA. LAW. 18 (Aug. 1998). Munster

children and the rights of parents inevitably come into conflict when children are abused or neglected—the number of conflicts is astounding.⁵ Because of an inability to accurately predict what percentage of actual abuse and neglect cases are being reported, the actual number of instances is likely even more overwhelming than estimated.⁶

Given this conflict, choices must be made by the courts. Often these choices are the most difficult facing any tribunal. Too often, however, these difficult decisions are avoided by judges.⁷ The ambivalence of judges in confronting the issues of abuse and neglect, combined with the desire to put off confrontation, leads to delay.⁸ Moreover, courts and the participants in the process often avoid confrontation and draw orders which appear to reflect more of a compromise “than a determination of the best interests of the children.”⁹ The avoidance is evident in the attitudes of judges, attorneys, and Department of Health and Human Resources (“DHHR”) workers towards the termination of parental rights.¹⁰ This avoidance leads to delays in decision-making and delays in finding permanent homes for abused and neglected children.¹¹ Despite these delays, the choice remains clear. In order to protect the right of children to be raised in a nurturing, stable environment, the parental rights of some individuals must be terminated.¹²

II. CHILD ABUSE AND NEGLECT IN WEST VIRGINIA COURTS

The West Virginia Supreme Court of Appeals has tried to balance these rights and find the proper equilibrium for children and their parents in those situations deemed to constitute child abuse and neglect by the West Virginia Legislature.¹³ At the forefront, the Court has recognized that “[c]hild abuse and

notes that three million children in 1995 were reported to be abused or neglected. West Virginia, in fact, ranked seventeenth in the country with 19,544 children reported as abused or neglected. *Id.*

⁵ See *id.* Over a seven year span in the late 1980's the number of sexually abused children rose by 83 percent. During this time the number of physically neglected children rose by 102 percent and the number of emotionally neglected children rose by an amazing 333 percent. *Id.*

⁶ See *id.*

⁷ See Final Report and Recommendations of the West Virginia Supreme Court of Appeals Advisory Committee on Child Abuse and Neglect (Nov. 13, 1995) [hereinafter Final Report].

⁸ See *id.* at 21.

⁹ *Id.* at 22.

¹⁰ See *id.* at 16. Sixty percent of circuit court judges, 70 percent of attorneys and 88.5 percent of DHHR workers see parental right termination as the last resort, occurring only after every possibility has failed over a long period of time. *Id.*

¹¹ See Final Report, *supra* note 7, at 21.

¹² See *id.*

¹³ An abused child is defined under W. VA. CODE § 49-1-3 (1999) as “a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally

neglect cases must be recognized as being among the highest priority for the courts' attention."¹⁴ In discussing the tension between parental rights and children's rights, the Court has been equally clear. The law properly recognizes that natural parents enjoy a great deal of protection in their parental rights.¹⁵ The Court has also recognized that "one of the primary goals of the social service network and the courts is to give aid to parents and children in an effort to reunite them."¹⁶ Despite the recognition of these goals and of parental rights, West Virginia places its main emphasis on the welfare of its children.¹⁷ The State Supreme Court has clearly indicated that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children."¹⁸ In fact, the best interest of the child in child abuse and neglect cases is of paramount concern under West Virginia law.¹⁹ Understanding the significance of these competing rights, the West Virginia Legislature has required that there be a showing of clear and convincing proof prior to the termination of parental rights.²⁰

Unfortunately, protection of the child's best interest is only a stated ideal for West Virginia jurisprudence in child abuse and neglect cases. The reality in West Virginia has often been a system of procedural delays and cases falling through the cracks in the judicial system.²¹ The result has been that children too often remain in "a limbo-like state" at a time in their lives when a nurturing, permanent home is crucial.²² The reality of this system wreaks havoc on the lives of those children who depend on the legal system to assure the protection of their

inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or (2) Sexual abuse or sexual exploitation; or (3) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section sixteen [§ 48-4-16], article four, chapter forty-eight of this code."

A neglected child is defined under W. VA. CODE § 49-1-3 (1999) as a child: "(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or (B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian."

¹⁴ Syl Pt. 1, *In re Carlita B.*, 408 S.E.2d 365 (W. Va. 1991).

¹⁵ *See id.* at 375.

¹⁶ *Id.*

¹⁷ *See In re Katie S.*, 479 S.E.2d 589 (W. Va. 1996).

¹⁸ *Id.* at Syl Pt. 3.

¹⁹ *See In re Jeffrey R.L.*, 435 S.E.2d 162 (W. Va. 1993); *see also In re Christina L.*, 460 S.E.2d 692 (W. Va. 1995).

²⁰ *See* W. VA. CODE § 49-6-2(c) (1999).

²¹ *See In re Carlita B.*, 408 S.E.2d at 374.

²² *See id.* at 375.

rights.²³ Children are facing “extended periods of time without any real resolution for the child.”²⁴ The results have had a disastrous effect on the lives of West Virginia’s abused and neglected children.²⁵

III. WEST VIRGINIA SUPREME COURT ADVISORY COMMITTEE ON CHILD ABUSE AND NEGLECT

The West Virginia Supreme Court has responded to the obvious need resulting from the disastrous effects stated above. The Court ordered the creation of the Advisory Committee on Child Abuse and Neglect in an effort to address the procedural delays, lack of permanency, and havoc wreaked by the general procedural inefficiencies.²⁶ The Committee worked to identify the barriers to permanency which were present in West Virginia’s child abuse and neglect cases.²⁷ The barriers that the Committee identified have often proven to be the significant obstacles which leave children living adrift in abuse and neglect proceedings.²⁸

At the outset, the Advisory Committee found that those involved in the process, including the attorneys and judges, were hindered by continuing confusion in their efforts to balance the rights of parents and children.²⁹ In their findings, the Committee found that “too often uncertainty regarding the balancing of these rights gives in to a well-entrenched presumption that the right of parents to improve supercedes the right of children to permanency.”³⁰ The Committee refuted this presumption by relying on federal laws that declare that permanent homes must be arranged in a reasonable time for children who are unable to be reunited with their families.³¹ Such an arrangement is “critical to the child’s emotional well-being.”³² The West Virginia Supreme Court has noted that courts are not expected to “exhaust every speculative possibility of parental improvement” when it is apparent

²³ See *id.*

²⁴ *Id.* at 374.

²⁵ See Munster, *supra* note 4.

²⁶ See generally Final Report, *supra* note 7 (Nov. 13, 1995) (recognizing that the West Virginia Supreme Court first ordered the creation of the advisory committee in *Jennifer A. v. Burgess*, No. 21009 (July 16, 1993) and next broadened the mission of the committee in *State ex rel. S.C. v. Chafin*, 444 S.E.2d 62 (W. Va. 1994)).

²⁷ See Final Report, *supra* note 7, at 1.

²⁸ See *id.* at 1-2.

²⁹ See *id.* at 16.

³⁰ *Id.* at 16.

³¹ See *id.* at 16 (citing 42 U.S.C. § 427(a)(2)(C); 42 U.S.C. § 675(1)(B); 42 U.S.C. § 675(5)(B); and 42 U.S.C. § 675(5)(C)).

³² Final Report, *supra* note 7, at 18.

that the welfare of the child will be threatened.³³

In its findings, the Committee also found that delays in the process were preventing the achievement of permanency for children who were abused or neglected.³⁴ The Committee concentrated on the improper use of improvement periods in child neglect and abuse proceedings.³⁵ The Committee emphasized that the time spent in pre-adjudicatory improvement periods was often wasted time.³⁶ It further indicated a general ineffectiveness of pre-adjudicatory improvement periods in benefiting the abused or neglected child.³⁷ The Committee noted that "up to a year can be wasted while family members go through the motions of attending therapy and other programs but do not really benefit from them since no final determination of the actual nature of the problems has been made."³⁸ In fact, the Committee found such misuse of the then-existing twelve month pre-adjudicatory improvement periods that it recommended their total elimination from child abuse and neglect proceedings.³⁹ In the alternative, the Committee suggested that at the very least the periods should be shortened to minimize the delay caused by them.⁴⁰ The suggested revisions also included a shift in the burden for those parents who requested improvement periods.⁴¹ When analyzing post-adjudicatory improvement periods, the Advisory Committee noted that too often the improvement periods are repeatedly extended for months, or even years, which greatly increases the time available to parents for improvement.⁴² Parental improvement is certainly beneficial if fully achieved. However, extending the improvement period for years "unquestionably has a detrimental impact upon the affected child's sense of security and place, and can result in lost opportunities for permanent placement."⁴³

The analysis and recommendations of the Advisory Committee concerning the parental improvement periods were well received by the Court, as well as the Legislature. In 1996, the West Virginia Legislature amended the statutes dealing

³³ See Syl Pt. 3, *In re Darla B.*, 331 S.E.2d 868 (W. Va. 1985); see also West Virginia DHHR *ex rel. McClure v. Daniel B.*, 507 S.E.2d 132 (W. Va. 1998).

³⁴ See Final Report, *supra* note 7, at 21.

³⁵ See *id.* The Committee found barriers in both the inappropriate and excessive use of pre-adjudicatory improvements periods and noted that prolonged post-adjudicatory improvement periods decrease the likelihood of finding permanency for abused and neglected children.

³⁶ See *id.* at 24 (noting that the "pre-adjudicatory improvement period places 'the cart before the horse' in that it gives the parent(s) up to twelve months to work towards goals before the facts of the case have been determined.").

³⁷ See *id.*

³⁸ *Id.* at 24.

³⁹ See Final Report, *supra* note 7, at 25.

⁴⁰ See *id.* at 26.

⁴¹ See *id.*

⁴² See *id.* at 31.

⁴³ *Id.*

with child abuse and neglect to reflect the revisions suggested for the improvement periods allowed under West Virginia law.⁴⁴ Furthermore, the West Virginia Supreme Court adopted new Rules of Procedure for Child Abuse and Neglect Proceedings, which went into effect on January 1, 1997.⁴⁵ This article will focus on these changes in the improvement period process, the result of these changes, and the deplorable circumstances which arose prior to these changes.⁴⁶ This article also considers recent revisions to federal law which proves helpful in examining the focus and success West Virginia lawmakers had in improving child abuse and neglect proceedings.

IV. IMPROVEMENT PERIODS UNDER WEST VIRGINIA LAW

Improvement periods have long been a part of child abuse and neglect proceedings under West Virginia law. The child abuse and neglect statutes have always considered that improvement periods provided by the court would be used to address the problems which might otherwise lead to the termination of parental rights.⁴⁷ These periods have always been used to facilitate reunification when it is in the best interests of the children involved.⁴⁸

A. *Improvement Periods Prior to 1996*

Prior to the legislative and judicial action of 1996, the availability of improvement periods in parental termination proceedings was nearly universal.⁴⁹ In many ways, the Court had considered the availability of improvement periods as a statutory entitlement for parents in such proceedings.⁵⁰ The statutory language required that the court "shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof"⁵¹

⁴⁴ See H.B. 4138, 72nd Leg., 2d Reg. Sess. (W. Va. 1996) (becoming effective law under W. VA. CODE § 49-6-1 *et seq.* on July 1, 1996).

⁴⁵ See generally W. VA. R.P. ABUSE & NEGLECT PROC. (2000).

⁴⁶ Many other reforms of the child abuse and neglect proceedings process have been undertaken in addition to changes in the improvement period procedure. See Munster, *supra* note 4. This article will restrict its focus, however, to the reform of improvement periods and its effect on achieving the goal of safe and permanent homes for children in a timely fashion.

⁴⁷ See Daniel L. McCarthy, *Anticipated Effects of New Procedural Rules and Statutory Changes in Abuse and Neglect Cases*, 10 W. VA. LAW. 14, 14 (July 1997).

⁴⁸ See *State ex rel. Amy M.*, 470 S.E.2d at 212.

⁴⁹ See W. VA. CODE § 49-6-2(b) (1995). A court shall allow an improvement period "unless it finds compelling circumstances to justify denial thereof" *Id.*

⁵⁰ See Cheryl M., 356 S.E.2d at 184 (citing *State v. Scritchfield*, 280 S.E.2d 315, 321 (W. Va. 1981) ("Clearly, the statute presumes the entitlement of a parent to an opportunity to ameliorate the conditions or circumstances upon which a child neglect or abuse proceeding is based.")).

⁵¹ W. VA. CODE § 49-6-2(b) (1995).

Prior to a final hearing, improvement periods under the prior statutory language were allowed for “three to twelve months in order to remedy the circumstances or alleged circumstances”⁵² West Virginia law also provided an improvement period “not to exceed twelve months” after a finding of abuse or neglect.⁵³ For the post-adjudicatory improvement periods, the statutory language mandated that only one such improvement period would be granted.⁵⁴

B. *Improvement Periods Following the 1996 Amendments and Additions*

Following the Advisory Committee recommendations, the West Virginia Legislature made significant changes to W.Va. Code Section 49-6-1 *et seq.*⁵⁵ The primary effect of the new statutory language is to strictly limit the discretion of courts in granting improvement periods and to impose structure and time limits on those improvement periods that are granted.⁵⁶

Furthermore, the newly enacted Rules of Procedure for Child Abuse and Neglect Proceedings aid courts in applying these new statutory standards.⁵⁷ The statutory language, court decisions and rules rely on several essential principles.⁵⁸ First, they rely on the understanding that the purpose of these proceedings is to assure safety for children and the belief that children who are not living in a permanent home are not safe.⁵⁹ The new law recognizes the reality that an “[e]xtended period of time in legal limbo is a form of child abuse and neglect.”⁶⁰ Second, the new statutory provisions and rules recognize that effective child abuse and neglect remedies require community solutions implemented with a coordinated, team-like approach.⁶¹

In applying these principles, the first significant change in the law is the standard that parents must show in order to actually be granted an improvement

⁵² See *id.*

⁵³ See W. VA. CODE § 49-6-5(c) (1995).

⁵⁴ See *id.*

⁵⁵ See H.B. 4138, 72nd Leg., 2d Reg. Sess. (W. Va. 1996) (becoming effective law under W. VA. CODE § 49-6-1 *et seq.* on July 1, 1996). The Legislature amended and reenacted the aforementioned sections two and five and amended those articles by adding article twelve of chapter forty-nine to West Virginia's statutory code. See *id.*

⁵⁶ See Brenda Waugh, *Legislative Action Affects Children in West Virginia*, 9 W. VA. LAW. 22, 22 (July 1996); see also W. VA. CODE § 49-6-12 (1999).

⁵⁷ See W. VA. R.P. ABUSE & NEGLECT PROC. §§ 23, 37-38 (2000).

⁵⁸ See generally Catherine D. Munster, *Update on West Virginia's Law of Child Abuse and Neglect and the Role of Advocates*, West Virginia CLE (1998).

⁵⁹ See *id.* at 1.

⁶⁰ *Id.*

⁶¹ See *id.*

period prior to the termination of parental rights.⁶² This change arose directly from the Advisory Committee's recommendations.⁶³ West Virginia's statutory language now requires that the parent demonstrate, "by clear and convincing evidence," that he or she "is likely to fully participate in the improvement period."⁶⁴ Furthermore, the parent or guardian must show that he or she has "not previously been granted any improvement period" or, in the alternative, must demonstrate that "since the initial improvement period" he or she "has experienced a substantial change in circumstances."⁶⁵ The parent or guardian seeking an additional improvement period must further demonstrate that as a result of a substantial change of circumstances, he or she "is likely to fully participate in a further improvement period."⁶⁶

Other changes were made to the time limitations placed on all types of improvement periods. One example is that for pre-adjudicatory improvement periods, the statute allows courts to grant an improvement period "not to exceed three months."⁶⁷ Furthermore, there are no extensions for pre-adjudicatory improvement periods available to courts under the new statute.⁶⁸ In allowing post-adjudicatory improvement periods, West Virginia law now permits a court to grant "an improvement period of a period not to exceed six months."⁶⁹ Furthermore, the statutory language also allows courts to "grant an improvement period not to exceed six months as a disposition."⁷⁰ Unlike pre-adjudicatory improvement periods, West Virginia law allows post-adjudicatory and dispositional improvement periods to be extended for "a period not to exceed three months."⁷¹ This extension is allowed only when three conditions are met.⁷² First, the court must find that the parent has "substantially complied with the terms of the improvement period."⁷³ Second, the court also must find that "continuation of the improvement period will

⁶² See Final Report, *supra* note 7, at 26.

⁶³ See *id.* (stating "[t]he Revisions should include: a) shifting the burden of proof to obtain a pre-adjudicatory improvement period so as to require the parent(s) to show, by clear and convincing evidence, compelling reasons to justify why an improvement period should be granted.").

⁶⁴ W. VA. CODE § 49-6-12(a)(2) (1999) (for pre-adjudicatory improvement periods); W. VA. CODE § 49-6-12(b)(2) (1999) (for post-adjudicatory improvement periods) and W. VA. CODE § 49-6-12(c)(2) (1999) (for post-dispositional improvement periods). W. VA. CODE § 49-6-12 (1999) is a completely new section which amends the prior statutory language dealing with improvement periods under W. VA. CODE § 49-6-2 (1999).

⁶⁵ W. VA. CODE § 49-6-12(b)(4), (c)(4) (1999).

⁶⁶ W. VA. CODE § 49-6-12(b)(4) (1999).

⁶⁷ W. VA. CODE § 49-6-12(a) (1999).

⁶⁸ See Munster, *supra* note 58; see also W. VA. CODE § 49-6-12 (1999).

⁶⁹ W. VA. CODE § 49-6-12(b) (1999).

⁷⁰ W. VA. CODE § 49-6-12(c) (1999).

⁷¹ W. VA. CODE § 49-6-12(g) (1999).

⁷² See *id.*

⁷³ *Id.*

not substantially impair the ability . . . to permanently place the child.”⁷⁴ Finally, if these conditions are met and the extension is “otherwise consistent with the best interest of the child,” the court is free to issue the three-month extension.⁷⁵ It was quickly recognized that the new enactments establish a “clear statutory mandate” to limit improvement periods.⁷⁶

Significantly, the current statutory language and rules have included a mandatory structure for supervision of the process. If a motion for an improvement period is granted, the law requires the Department of Health and Human Resources, with input from a multi-disciplinary treatment team, to submit a “family case plan” within thirty days of such a ruling.⁷⁷ The requirements for such a plan are legislated by statute.⁷⁸ The new law and rules require that there be mandatory judicial reviews of the improvement period either within sixty or ninety days.⁷⁹

V. AN ILLUSTRATION OF THE NEED FOR CHANGE: THE CASE OF *AMY M.*⁸⁰

The need for change was obvious as evidenced by the many cases that can be cited as prime examples of failures in the system. Specifically, the case of *Amy M.* highlights the necessity of the recent efforts at bettering the system.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *State ex rel. Amy M.*, 470 S.E.2d at 212; see also *West Virginia DHHR ex rel. McClure*, 507 S.E.2d at 135.

⁷⁷ See W. VA. R.P. ABUSE & NEGLECT PROC. 23(a), 37 (2000); see also W. VA. CODE § 49-6-12(a)(4), (b)(5), (c)(5) (1999).

⁷⁸ See W. VA. CODE § 49-6D-3(1999); see also W. VA. R.P. ABUSE & NEGLECT PROC. 23(a), 37 (2000); W. VA. CODE § 49-6-12(a)(4), (b)(5), (c)(5) (1999). W. VA. CODE § 49-6D-3 provides that all family case plans must contain:

(1) A listing of specific, measurable, realistic goals to be achieved; (2) An arrangement of goals into an order of priority; (3) A listing of the problems that will be addressed by each goal; (4) A specific description of how the assigned caseworker or caseworkers and the abusing parent, guardian or custodian will achieve each goal; (5) A description of the departmental and community resources to be used in implementing the proposed actions and services; (6) A list of the services . . . which will be provided; (7) Time targets for the achievement of goals or portions of goals; (8) An assignment of tasks to the abusing or neglecting parent, guardian or custodian, to the caseworker or caseworkers and to other participants in the planning process; and (9) A designation of when and how often tasks will be performed; and (10) The safety of the placement of the child and plans for returning the child safely home.

⁷⁹ See W. VA. R.P. ABUSE & NEGLECT PROC. 23(b), 37 (2000); see also W. VA. CODE § 49-6-12(a)(3), (b)(3), (c)(3) (1999). The rules and statutory provisions require that the court granting the period shall order “a hearing be held to review the matter within sixty days of the granting of the improvement period or . . . within ninety days” if the court orders “the department to submit a report as to the respondent’s progress in the improvement period within sixty days of the order granting the improvement period.” W. VA. R.P. ABUSE & NEGLECT PROC. 23(b), 37 (2000).

⁸⁰ See *State ex rel. Amy M. v. Kaufman*, 470 S.E.2d 205 (W. Va. 1996).

Betty Jo B., age twenty-three, and Shane B. were the mutual parents of four, and possibly five, of Betty Jo's children, who ranged in age from two to seven.⁸¹ On February 1, 1994, police responded to a call from an individual stating that "he was caring for two of the children and refused to do so any longer."⁸² The police ascertained that Betty Jo had left the children with this individual a day earlier, telling him to watch the children while she went to cash a check.⁸³ Upon arriving at the children's home, the police found "conditions they described as 'beyond belief,'"⁸⁴ and the police took emergency custody of the children.⁸⁵ The West Virginia Department of Health and Human Resources had previously documented several incidents of intervention dating back nearly four years.⁸⁶

Ten days later, and six days after abuse and neglect petitions were filed, the Circuit Court of Kanawha County granted a pre-adjudicatory improvement period.⁸⁷ The Court granted the motion for an improvement period to run from February 10, 1994 to May 10, 1994.⁸⁸ Subsequently, on May 27, 1994, a status review was held.⁸⁹ The Court observed that the parents had consistently complied with the order, and the Circuit Court thereby extended the improvement period for

⁸¹ See *id.* at 208.

⁸² *Id.*

⁸³ See *id.*

⁸⁴ *Id.* Police found conditions which included:

human excrement in the toilet, all over a potty chair and smeared on the walls; broken glass, trash, food, and dirty diapers strewn throughout the house; a filthy bathroom; urine-stained beds with no sheets; and a large kitchen knife on the bedroom floor. The children, then aged eight months to five years, had no food, and what little clothing they had was extremely dirty. All were badly infested with head lice, and ill to varying degrees.

Amy M., 470 S.E.2d at 208.

⁸⁵ See *id.*

⁸⁶ See *id.* Furthermore, incidents in which relatives and neighbors had taken the children to the hospital posing as Betty Jo B. were noted. See *id.* Conditions further revealed that "the older children were sleeping on a box on the floor, while the infant twins, who had no cribs, slept in a car seat and a baby swing." *Id.* at 208-09. There were further "reports of numerous abandonments for days at a time with adequate provision for food, diapers, or supervision of the children." State *ex rel.* Amy M., 470 S.E.2d at 209. In July 1993, a child protective worker testified to "deplorable living conditions . . . including no beds, no food, ill children, and generally unsanitary conditions." *Id.* A nurse examining Amy M. in November 1993 testified to an incident in which "the child had a urinary tract infection so severe that it had the potential for serious long-term consequences." *Id.* Incredibly, the nurse further testified that she was accompanied to the hospital by a mother "who was so obviously intoxicated that the nurse felt it necessary to call a neighbor and a cab just to get the child home safely." *Id.*

⁸⁷ See *id.*

⁸⁸ See Amy M., 470 S.E.2d at 209. The order granted temporary custody to DHHR, and a family case plan was ordered as well as a psychological evaluation, substance abuse evaluations, parenting classes and medical and psychological evaluations for all the children. See *id.*

⁸⁹ See *id.*

an additional six months.⁹⁰ Near the end of this second improvement period, the court noted that the parents' progress in their effort toward reunification had deteriorated.⁹¹ Despite this deterioration, the Court once again extended the improvement period.⁹² Over four months later, Court records indicate that yet another improvement period extension was granted.⁹³ All of these extensions occurred prior to any adjudication of abuse or neglect of the children.⁹⁴ Meanwhile, the children remained in the custody of the Department of Health and Human Resources.⁹⁵ Finally, in April, 1995, over one year after the initial improvement period was granted, an overnight visit in which Betty Jo B. once again demonstrated her inability to care for her children, led to a motion to schedule adjudication on the matter.⁹⁶

Four months later, on August 29, 1995, the first adjudicatory hearing on child abuse and neglect was held.⁹⁷ At this time, no ruling was made on the issue of abuse and neglect.⁹⁸ Furthermore, there was no termination of the improvement period.⁹⁹ On November 20, 1995, "fully one year and nine months after the children were removed from the home, and having exhausted nearly every possibility of parent education and rehabilitation with little or no improvement apparent on the record, the court made a finding of neglect" under West Virginia law.¹⁰⁰ On the very same day, the judge granted a post-adjudicatory improvement period without time limit or terms and conditions.¹⁰¹ One month later, the Court issued an order which granted a ninety-day improvement period which began retroactively from the

⁹⁰ See *id.*

⁹¹ See *id.* The evidence indicated that the parents were not attending parenting classes. See *State ex rel. Amy M.*, 470 S.E.2d at 209. It further showed that they had not visited the kids for over four months. See *id.* Other evidence indicated that Betty Jo B. took her two year-old and four year-old to a bar while one of the girls "went out on her own, searching for her mother in the bars." *Id.* Moreover, two of the children returned from one unsupervised visit with "unexplained knots on their heads." *Id.*

⁹² See *id.* at 210. (noting that while the circuit court had adequately monitored the case to that point, the court lapsed into continuing the improvement period when no such improvement period was called for).

⁹³ See *Amy M.*, 470 S.E.2d at 210. This extension came over one year after the initial improvement period was granted in an order dated March 25, 1995. See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *Amy M.*, 470 S.E.2d at 210.

⁹⁸ See *id.*

⁹⁹ See *id.* The improvement period which had been in effect since February 10, 1994, appeared to be "open-ended" and illustrated the difficulty which was created by continuing improvement periods beyond their statutory limits. *Id.*

¹⁰⁰ *Id.* at 211.

¹⁰¹ See *Amy M.*, 470 S.E.2d at 210. This order was entered "over the vehement objection of both the State and the guardian ad litem." *Id.*

November hearing date.¹⁰²

At that time, a writ of prohibition was filed with the State Supreme Court. The State Supreme Court found that a writ of prohibition was, indeed, appropriate in the case because the Circuit Court had violated the clear statutory mandate to limit the extent and duration of improvement periods.¹⁰³ Recognizing “the tendency of cases such as these to fall through the cracks,” the State Supreme Court found that the procedural delays and decisions to “further postpone any permanency decision with regard to these children would be unconscionable.”¹⁰⁴ In doing so, the Court granted the writ of prohibition to prevent the Circuit Court from enforcing its order of an additional improvement period for Betty Jo B.

VI. ANTICIPATED EFFECTS OF THE NEW IMPROVEMENT PERIODS

The new statutory and procedural rules mirror many of the recommendations set out by the West Virginia Advisory Committee on Child Abuse and Neglect.¹⁰⁵ Despite the reliance on many of the Advisory Committee’s findings, parties have differed in their opinions on the effects of these changes.¹⁰⁶ The changes in the improvement periods are in some ways very profound and, in others, seem simply to be a slight modification. In any respect, they arise from an effort to address many of the problems present in West Virginia child abuse and neglect cases prior to their enactment. In every way, the laws are designed to secure the safety of the child by placing them more quickly in a permanent home.¹⁰⁷ What follows is a discussion of the effects of some of the changes, the reasoning, and purpose behind these changes.

This discussion begins with the change in the standard that is required to be met before an improvement period will even be granted. By shifting the burden from the petitioner, usually the DHHR, to the parents, the legislature has essentially required parents to demonstrate that an improvement period would be beneficial. In the past, the DHHR had the burden of proving that there was a compelling need to deny the improvement period. Today, however, parents must prove by clear and convincing evidence that they will likely fully participate in the terms and conditions of the period. To accomplish this task, parents must acknowledge that there is an abuse and neglect problem before an improvement period will be granted because without acknowledgement, this problem is untreatable.¹⁰⁸

¹⁰² See *id.*

¹⁰³ See *id.* (noting this intention even under the statutory provisions in effect prior to 1996).

¹⁰⁴ *Id.* at 213. Noting this unconscionability, the Court pointed out that “five young children have lived in foster care limbo since February 1, 1994, more than two years of their young lives.”

¹⁰⁵ See generally Final Report, *supra* note 7.

¹⁰⁶ See Ronald E. Wilson, *I Respectfully Dissent*, 10 W. VA. LAW. 14 (Nov. 1996).

¹⁰⁷ See Munster, *supra* note 58, at 1.

¹⁰⁸ See *id.* at 6; see also West Virginia Dept. of Health and Human Resources v. Doris S., 475 S.E.2d

Additionally, parental entitlement to these improvement periods is no longer the case.¹⁰⁹ This change signifies an important reform in the law by demonstrating to parents that they must be serious about improving themselves as parents before they will be granted an improvement period. It further serves the purpose of eliminating those improvement periods that clearly have no chance of successfully reuniting children with their abusing parents.

Under the prior law, improvement periods were all too often granted, and were even granted when there was little chance of success and when such periods were not in the best interests of the child.¹¹⁰ Historically, only in the most egregious cases of abuse and neglect were parents denied an improvement period,¹¹¹ and even respondents in cases of flagrant and untreatable abuse and neglect were often given repeated improvement periods.¹¹² Today, improvement periods are allowed only in those cases in which the parents show a willingness to acknowledge their problems and actually comply with all of the terms and conditions to remediate the circumstances giving rise to the abuse and neglect.¹¹³

This change is a step forward to protect children who would otherwise endure a potentially devastating, extended period of time in "legal limbo."¹¹⁴ Participants in child abuse and neglect proceedings must realize that parental rights are not so inalienable as to allow parents to ignore their children's right to a safe and nurturing home.¹¹⁵ These changes advance the goals and principles set forth by the Legislature and the Court to provide a safe and permanent home for children in a fair and timely fashion.¹¹⁶

The goal of a timely and efficient disposition in placing children in permanent homes is forwarded by the implementation of a time-structured process. The current law significantly structures the time within the improvement period to insure that the court, as well as the agencies involved, are active in evaluating the parental progress and protecting the child's rights.¹¹⁷ In doing so, the law requires the proceedings to develop in the timely manner they deserve.¹¹⁸ This aspect of the

865 (W. Va. 1996).

¹⁰⁹ See *State ex rel. Virginia M. v. Virgil Eugene S.*, 475 S.E.2d 548 (W. Va. 1996) ("[R]ather than presuming the entitlement of a parent to an improvement period . . . , the law now places on the parent the burden of proof regarding whether an improvement period is appropriate.").

¹¹⁰ See Final Report, *supra* note 7, at 24.

¹¹¹ See *id.*

¹¹² See generally *Amy M.*, 470 S.E.2d 205.

¹¹³ See *Munster*, *supra* note 58.

¹¹⁴ See *McCarthy*, *supra* note 47, at 15.

¹¹⁵ Compare *Meyer*, 262 U.S. 390 with *Amy M.*, 470 S.E.2d 205.

¹¹⁶ See *Margaret Workman*, *Supreme Court Page*, 9 W. VA. LAW 7 (Dec. 1997).

¹¹⁷ See W. VA. CODE § 49-6-12 (1999); see also W. VA. R.P. ABUSE & NEGLECT PROC. 23 and 37.

¹¹⁸ See *State v. Julie G.*, 500 S.E.2d 877, 881 (W. Va. 1997) The trial court "regularly and frequently reviewed Julie's progress and amended her case plan, without delay, when various needs became apparent."

revised law and new rules “assure the Court’s active ‘hands on’ involvement in each case from its initiation until permanent placement is consummated.”¹¹⁹

The issue that raises the most controversy is the time limitations placed on the lengths of the various improvement periods. Under current law, courts lose the discretion to extend improvement periods after the statutory periods and extensions have run.¹²⁰ The result is a system of mandatory, accelerated time periods in which parents must meet the goals of the improvement period or face termination of their parental rights.¹²¹ This process may have no detrimental effect in those cases in which the improvement periods have shown that termination of parental rights is the only viable option. Few cases, however, are that clear cut.¹²² Indeed, “more often cases fall in a ‘gray’ area where parents recognize at least some of their problems and are willing to accept services in an effort to rectify the circumstances giving rise to the abuse and/or neglect.”¹²³ It is under these conditions that courts may have difficulty applying the present provisions. Parents who have made some progress toward the goals outlined in the family case plan may not have achieved enough progress prior to the expiration of the mandatory limits to retain their parental rights. Under the current law, parents must be able to demonstrate, by the end of a span of twenty-one months, that they have progressed enough so that the safety of the child would be assured under reunification.¹²⁴ Thus, one of the perceived “down sides” of the new law arises out of the rigid requirement placed on judges hearing these cases that they must move to alternative permanency plans for the child if the parents cannot sufficiently improve in the twenty-one month time period.¹²⁵

Judges face these mandatory requirements throughout the proceedings. Critics argue that trial judges have the “responsibility to utilize available resources to make every effort to keep families together.”¹²⁶ Most judges would argue that they are the ones who are in the best position to protect the rights of abused and neglected children.¹²⁷ It is argued that, under current law, this ability is taken away

In doing so the Supreme Court noted that the “court truly handled this case with the type of priority that child abuse and neglect cases deserve, but of which they are all too often deprived.” *Id.*

¹¹⁹ See McCarthy, *supra* note 47; see also W. VA. R.P. ABUSE & NEGLECT PROC. 6 (stating that “[e]ach civil protection proceeding shall be maintained on the court’s docket until permanent placement of the child has been achieved.”)

¹²⁰ See McCarthy, *supra* note 47.

¹²¹ See *id.*

¹²² *Id.*

¹²³ *Id.* at 14.

¹²⁴ See *id.*

¹²⁵ See Wilson, *supra* note 106.

¹²⁶ *Id.* at 14.

¹²⁷ See *id.*

from trial judges.¹²⁸ These same critics note that finite improvement periods require judges to concentrate, not on the specific problems unique to each case, but rather, the calendar in an effort to meet the mandated time limits.¹²⁹

The system that results from the revisions of 1996, however, places the emphasis where it belongs. Proceedings today focus on the child's right to permanency. The structure of the current proceedings recognizes the child's right to secure a safe home within a reasonable time.

Critics who oppose the new changes also argue that the new time limits are simply not long enough.¹³⁰ The critics ignore, however, the time requirements mandated by federal law following the Adoption and Safe Families Act of 1997 ("ASFA") and the strict compliance required by the ASFA as a condition to the continued receipt of federal funds.¹³¹ These accelerated time periods may have a significant impact on the outcome of child abuse and neglect proceedings.¹³² Most significant is the potential for an increased number of terminations.¹³³

These outcomes are not as devastating as they appear. It should be noted that the new statutes allow for a total of twenty-one months, including extensions, in which parents are granted time to improve.¹³⁴ Certainly, twenty-one months is not a greatly extended period of time. However, given that often this time period is imposed for the benefit of children who may not even be twenty-one months old, the time limit should not be considered so imposing. It must be observed "that because children have a 'sense of time' much shorter than that of adults, they can suffer grievously from brief periods of uncertainty."¹³⁵ Considering the welfare of abused and neglected children who are under two years old, the new time restrictions are not too short. West Virginia has set forth a policy in child abuse and neglect cases which places the child's welfare at the forefront. Therefore, while the results may "seem drastic on first blush," they really serve the "ultimate goal of

¹²⁸ *Id.* at 14 (stating that "[i]n repudiating post-adjudicatory improvement periods in excess of nine months, the movers and shakers now calling the shots in this gut-wrenching work have struck a fatal blow to child termination decisions based upon the divergent facts unique to each case.").

¹²⁹ *See id.*

¹³⁰ Wilson, *supra* note 106, at 15. Focusing primarily on post-adjudicatory improvement periods, Judge Ronald E. Wilson said that "nine months is not enough time to solve the multiple problems afflicting most of these troubled households." *Id.*

¹³¹ *See* Adoption and Safe Families Act of 1997, P. L. No 105-89; *see also* Ernestine Steward Gray, *The Adoption and Safe Families Act of 1997*, 46 LA. B.J. 477 (1999).

¹³² *See* McCarthy, *supra* note 47.

¹³³ *See id.* at 14-5 (noting that "when the maximum time allowable for improvement periods has expired, . . . then the Court has no further discretion to give the parents more time to improve, but must instead move to assure the child a safe and permanent home elsewhere. Thus it is likely that Courts will find that utilizing some form of alternative disposition, probably termination may become more commonplace. Assuming that family reunification in some form is not utilized, then the options become termination . . . or some permanent out-of-home placement.").

¹³⁴ *See* W. VA. CODE § 49-6-12 (1999).

¹³⁵ *See* Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 655 (1999).

assuring that children are placed in safe and permanent homes, within a reasonable period of time, rather than spending their most formative years in 'legal limbo.'"¹³⁶

It is too early to determine if the reality has changed to more closely mirror the ideal. However, the aspirational view of placing the child's best interest as the paramount concern that the Legislature and Courts touted prior to 1996 is now becoming more of the reality. The structure and process now lend themselves to better protection of the health and welfare of children. At least under the current statutory scheme, the reality of the structure and process no longer differ from the aspirational goals of those involved in protecting the child's welfare.

VII. AN ANALYSIS OF RECENT DEVELOPMENTS IN CHILD WELFARE LAW AT THE FEDERAL LEVEL

Developments in child welfare law have occurred at the federal level, as well as in West Virginia. Many of the same criticisms of West Virginia's child welfare laws were also present at a national level. In all jurisdictions, child welfare laws must be balanced to insure the protection of children's rights. Whether it be in West Virginia or at the federal level, it is widely recognized that the state has long been held as the "ultimate protector of children."¹³⁷ It is this duty to protect children that seemed to be failing at all levels of child welfare law. In fact, federal lawmakers recognized many of the same concerns that the West Virginia Supreme Court Advisory Committee on Child Abuse and Neglect pinpointed in West Virginia. As a result of this recognition, federal lawmakers took steps to reform the child welfare system, which mirrored the effort in West Virginia in many respects.

Just one year after the West Virginia legislature enacted many of the reforms in improvement periods and child welfare law discussed earlier, the 105th Congress overwhelmingly recognized that a "child's health and safety shall be the paramount concern" when dealing with children facing separation from their parents.¹³⁸ On November 19, 1997, President Clinton signed the Adoption and Safe Families Act of 1997. At that time it was clear that the fundamental principle of the Act was "to 'reform the child welfare system to work better for the children it serves, to put their health and safety first' in all efforts to achieve reunification or permanent placement."¹³⁹ Likewise, the Adoption and Safe Families Act recognizes that "foster care is temporary."¹⁴⁰

This recognition gradually developed after the enactment of the Adoption

¹³⁶ See McCarthy, *supra* note 47, at 15.

¹³⁷ See Gray, *supra* note 131, at 477.

¹³⁸ Pub. L. No. 105-89, 111. Stat. 2115, 2116 (amending 42 U.S.C. § 671(a)(15)(A)).

¹³⁹ See Gray, *supra* note 131, at 478 (citing remarks by the President and First Lady at the Adoption Bill signing, the White House Office of the Press Secretary, Nov. 19, 1997).

¹⁴⁰ *Id.* at 478.

and Child Welfare Act of 1980 ("AACWA").¹⁴¹ During the 1970's there was a growing awareness of problems in foster care systems nationwide. A concept known as "foster care drift" developed in recognition of the fact that children, who were often removed from their parents, were seldom reunited, but instead, "drifted" from one temporary placement to another. These children experienced "[e]xtended periods in temporary care" as they were left in foster care for years while agencies tried to rehabilitate their abusive parents.¹⁴² In 1980, Congress attempted to alleviate this problem by reducing this "removal and providing permanency for children."¹⁴³

In doing so, the AACWA implemented hearings for children who had been removed to "determine whether the child welfare agency made reasonable efforts to prevent or eliminate the need for removal," as well as insure return of the child to the home.¹⁴⁴ The results were horrific. Many children in the system lacked any semblance of a permanent home. Instead, they were "set adrift . . . bouncing between placements."¹⁴⁵ Worse yet, there were children whose lives were "sacrificed for the sake of preserving the family."¹⁴⁶ Efforts to reunify at all costs too often led to children who were savagely beaten, prostituted or even killed.¹⁴⁷ Those viewing the child welfare system quickly determined that "reasonable efforts" had become unreasonable. Children's lives were in danger because the system placed too much emphasis on reuniting families and the rights of parents.

In the face of this dismal reality, the ASFA was established with two guiding principles developed to address concerns for child safety and foster care drift. First, "the child's health and safety shall be the paramount concern."¹⁴⁸ Second, the ASFA's guiding principles makes clear "that children deserve nurturing and permanent homes."¹⁴⁹

Supported by these basic principles, the ASFA addresses the concerns of child safety and foster care drift in several ways. These provisions are aimed "to prevent the dangerous reunification efforts" which were all too often present.¹⁵⁰ At the outset, the ASFA attempts to protect child safety by clarifying the "reasonable efforts" requirement in child welfare actions by establishing child safety and

¹⁴¹ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 42 U.S.C. §§ 620 *et seq.* and §§ 670 *et seq.*

¹⁴² See Gray, *supra* note 131, at 477.

¹⁴³ *Id.* at 478.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See Gordon, *supra* note 135, at 647.

¹⁴⁸ Pub. L. No. 105-89, 111 Stat. 2115, 2116 (amending 42 U.S.C. § 671(a)(15)(A)).

¹⁴⁹ Mimi Laver, *Implementing ASFA: A Challenge for Agency Attorneys*, 17 A.B.A. CHILD L. PRACT. 1, 1 (1998).

¹⁵⁰ See Gordon, *supra* note 129, at 650.

permanence as the “pre-eminent considerations” in defining what is a reasonable effort.¹⁵¹ The ASFA indicates that when continuing reasonable efforts to reunify are “determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan.”¹⁵² Furthermore, the ASFA allows efforts to find alternative placement to “be made concurrently with reasonable efforts” to reunite families.¹⁵³ Congress went further and indicated certain circumstances in which reasonable efforts to reunify would not be required. These circumstances include parents who have “subjected the child to aggravated circumstances,”¹⁵⁴ parents who have committed murder,¹⁵⁵ committed manslaughter,¹⁵⁶ or committed a “felony assault that results in serious bodily injury to the child or another child of the parent.”¹⁵⁷ Reasonable efforts to reunify also are not required in cases in which “the parental rights of the parent to a sibling have been terminated involuntarily.”¹⁵⁸

The ASFA also makes changes to accelerate placements to eliminate foster care drift. To begin with, the new law follows up the exceptions to reasonable efforts to reunify by insuring that when such efforts are not required, “a permanency hearing shall be held within 30 days” after such a determination.¹⁵⁹ Efforts must be made “to place the child in a timely manner,” as well as “finalize the permanent placement of the child.”¹⁶⁰ The Act also “requires timely decision making for permanency” in greatly compressed time frames.¹⁶¹ The ASFA modifies and accelerates permanency hearings by requiring that such hearing be held within twelve months of removal instead of eighteen months of removal.¹⁶² The Act also mandates that such a hearing cannot produce long-term foster care without a compelling reason.¹⁶³

To further expedite the process, the ASFA allows efforts to find alternative placement to “be made concurrently with reasonable efforts” to reunite families.¹⁶⁴

¹⁵¹ See Gray, *supra* note 131, at 479.

¹⁵² Pub. L. No. 105-89, 111 Stat. 2115, 2116 (amending 42 U.S.C. § 671(a)(15)(C)).

¹⁵³ Pub. L. No. 105-89, 111 Stat. 2115, 2116 (amending 42 U.S.C. § 671(a)(15)(F)).

¹⁵⁴ Pub. L. No. 105-89, 111 Stat. 2115, 2116 (amending 42 U.S.C. § 671(a)(15)(D)(i)).

¹⁵⁵ Pub. L. No. 105-89, 111 Stat. 2115, 2116 (amending 42 U.S.C. § 671(a)(15)(D)(ii)(I)).

¹⁵⁶ Pub. L. No. 105-89, 111 Stat. 2115, 2116 (amending 42 U.S.C. § 671(a)(15)(D)(ii)(II)).

¹⁵⁷ Pub. L. No. 105-89, 111 Stat. 2115, 2116 (amending 42 U.S.C. § 671(a)(15)(d)(ii)(IV)).

¹⁵⁸ Pub. L. No. 105-89, 111 Stat. 2115, 2117 (amending 42 U.S.C. § 671(a)(15)(D)(iii)).

¹⁵⁹ Pub. L. No. 105-89, 111 Stat. 2115, 2117 (amending 42 U.S.C. § 671(a)(15)(E)(i)).

¹⁶⁰ Pub. L. No. 105-89, 111 Stat. 2115, 2117 (amending 42 U.S.C. § 671(a)(15)(E)(ii)).

¹⁶¹ See Gray, *supra* note 131, at 478.

¹⁶² Pub. L. No. 105-89, 111 Stat. 2115, 2128 (amending 42 U.S.C. § 675(5)(C)(2)).

¹⁶³ See Gordon, *supra* note 135, at 651.

¹⁶⁴ Pub. L. No. 105-89, 111 Stat. 2115, 2117 (amending 42 U.S.C. § 671(a)(15)(F)).

Another provision of the Act aims to end foster care drift by requiring the termination of parental rights in the case of any child who has been in foster care for "15 of the most recent 22 months."¹⁶⁵

As with the changes in improvement periods under West Virginia law, the ASFA has received both high praise and a certain amount of skepticism. There are those who claim the ASFA "does nothing short of reverse 17 years of misguided child welfare policy."¹⁶⁶ This claim is not completely accurate. The ASFA is certainly not perfect law. However, few legislative enactments, if any, can ever be deemed as a perfect resolution.

The ASFA will likely not cure all the ills of a child welfare system that is fraught with many conflicting actors and influences. There may be areas in which parents' interests still hold too much control in the child welfare agencies' decision-making.¹⁶⁷ The disparity in opinion, however, lies in the details. As with the changes made to improvement periods by the West Virginia lawmakers, the ASFA does emphasize the appropriate principles.

Like the changes in West Virginia, the ASFA takes aspirational goals and aims to make these goals a reality. The renewed focus on child safety is a first step. The provisions direct that reasonable efforts to reunify must be truly reasonable. A more strict clarification of when such reasonable efforts are necessary takes many endangered children from those environments which offer the danger. Moreover, the shortened time frame for permanency planning requires all parties involved in the process to focus on placing children in a permanent, appropriate settings, in a timely fashion. There are sure to be occasions in which children suffer from inadequate protection or extended periods of temporary care. However, these occasions will be fewer and farther between following the enactment of the Adoption and Safe Families Act of 1997.

VIII. CONCLUSION

West Virginia is not alone. Cases of abuse and neglect by parents are all too common. Instances of inadequate proceedings and child protective services are also too often seen in child welfare systems across the country. Likewise, the facts of the *Amy M.* case are, unfortunately, not unique. The process too often leaves children in legal limbo or foster care drift. Cases too often did "fall through the cracks."¹⁶⁸ In fact, the West Virginia Supreme Court succinctly summarized the problems facing the courts and the debate following the new revisions, even prior to the revisions, when it stated, as early as 1991 that:

¹⁶⁵ Pub. L. No. 105-89, 111 Stat. 2115, 2118 (amending 42 U.S.C. § 675(5)(E)).

¹⁶⁶ R. Bruce Dold, *Giving Kids a Little More "Wiggle Room,"* CHI. TRIB., Dec 12, 1997, at 27.

¹⁶⁷ See generally Gordon, *supra* note 135.

¹⁶⁸ See *In re Carlita B.*, 408 S.E.2d 365 (W. Va. 1991).

Certainly many delays are occasioned by the fact that troubled human relationships and aggravated parenting problems are not remedied overnight.

The law properly recognizes that rights of natural parents enjoy a great deal of protection and that one of the primary goals of the social services network and the courts is to give aid to parents and children in an effort to reunite them. The bulk of the most aggravating procedural delays, however, are occasioned less by the complexities of mending broken people and relationships than by the tendency of these types of cases to fall through the cracks in the system. The long procedural delays in this and most other abuse and neglect cases considered by this Court in the last decade indicate that neither the lawyers nor the courts are doing an adequate job of assuring that children – the most voiceless segment of our society – aren't left to languish in a limbo-like state during a time most crucial to their human development.¹⁶⁹

These are the types of cases the revisions attempt to remedy. As the critics note, there will be some circumstances in which parents simply do not have the time to solve the multiple, complex problems which may afflict their troubled households.¹⁷⁰ There will be cases in which judges must terminate the parental rights of parents who have demonstrated some improvement.¹⁷¹ However, realistically, the goal of the West Virginia statutory provisions and procedural rules is not, and never has been, to reunite all families. Instead, the State has recognized that the most important principle that it should follow involves protecting the welfare of its children.¹⁷² As is evident from the changes in West Virginia law in 1996, and the ASFA just one year later, the lines in child welfare law are being redrawn. This effort involves providing all children with a safe, nurturing and permanent home.¹⁷³ Moreover, it involves doing so in a fair, timely, and efficient manner.¹⁷⁴ The new rules and statutory provisions take a step in the right direction to reaching this goal. Proceedings under both the state and federal statutory changes now focus more directly on the child's right to permanency and a permanency arrived at in a timely fashion.

It is recognized that circuit court judges have “an immensely difficult task”

¹⁶⁹ *Id.* at 375.

¹⁷⁰ *See* Wilson, *supra* note 106.

¹⁷¹ *See generally* McCarthy, *supra* note 47.

¹⁷² *See In re Katie S.*, 479 S.E.2d 589 (W. Va. 1996).

¹⁷³ *See* Munster, *supra* note 58.

¹⁷⁴ *See* Workman, *supra* note 116.

in sitting to decide upon the possible termination of parental rights in these child abuse and neglect cases.¹⁷⁵ The new revisions of improvement periods will certainly limit some decisions that these trial judges are able to make.¹⁷⁶ Importantly, it should be noted that a judge's discretion has not been entirely lost. Trial courts have considerable flexibility and discretion in structuring a "meaningful improvement period designed to address the myriad possible problems causing abuse and neglect."¹⁷⁷ These same courts have almost complete discretion on a judgment of whether an improvement period has proven successful.¹⁷⁸ This is true "whether or not the individual has completed all suggestions or goals set forth in family case plans."¹⁷⁹

The new revisions simply require these trial judges to give child abuse and neglect proceedings the priority and importance they deserve. The new revisions force courts to confront the difficult issues of abuse and neglect and force judges to make the difficult decisions they all too often are trying to avoid in granting improvement periods and extensions to these periods.¹⁸⁰ Just as importantly, the new statutory provisions and rules will require the courts, agencies and attorneys involved to spend a great deal of additional time and labor in processing each case.¹⁸¹ This additional time, albeit spent within a shorter time frame, should help assure all those involved in the process that "no abuse and neglect case will ever again "fall through the cracks."¹⁸² Furthermore, the current law should help assure that each child "will be permanently placed in a safe and secure environment, within a reasonable time period, subsequent to the initiation of the case."¹⁸³ This certainly could not be said for many of the cases arising prior to the 1996 revisions.

The question is whether the 1996 revisions are an improvement on improvement periods. The long-term outcomes have yet to be decided. However, the structure and the process which these new "improvements" implement, at the very least, set forth a process directed at placing the welfare and interests of children at the forefront of child abuse and neglect jurisprudence in West Virginia. Under the present law, the goals and aspirations of the State and the reality present in West Virginia are, at least, closer in form and process. Again, this could not be said about West Virginia child abuse and neglect law prior to 1996.

Children will certainly still fall through the cracks of a legal system which, at times, leaves them in legal limbo. However, West Virginia's Legislature and

¹⁷⁵ See *State ex rel Amy M. v. Kaufman*, 470 S.E.2d 205, 214 (W. Va. 1996).

¹⁷⁶ See *Wilson*, *supra* note 106.

¹⁷⁷ *Amy M.*, 470 S.E.2d at 212.

¹⁷⁸ See *id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *Final Report*, *supra* note 7, at 21.

¹⁸¹ See *McCarthy*, *supra* note 47.

¹⁸² *Id.* at 15.

¹⁸³ *Id.*

State Supreme Court have worked hard to close these cracks and eliminate the procedural delays that all too often wreak havoc on the lives of the most innocent and voiceless segment of our society.¹⁸⁴ The recent West Virginia revisions, as well as the ASFA, offer an opportunity for committed individuals to overcome the “cracks” in the system. The lofty goals set by these new laws will require those in the courts and agencies to renew their efforts to protect abused and neglected children. The changes in improvement periods are just one step in this process. It is, however, an important step and a step which should prove extremely beneficial to the abused and neglected children of West Virginia. These changes set a foundation upon which West Virginia may work to continue to improve upon its efforts to protect our children. In these efforts, West Virginia’s children do appear to be very fortunate. The West Virginia Supreme Court and lawmakers have “demonstrated exceptional leadership” in the battle to assure the timely placement and safety of abused and neglected children.¹⁸⁵ This leadership is illustrated as The Rules of Procedure for Child Abuse and Neglect Proceedings are “the first of its kind in the nation and places West Virginia in the forefront of the nationwide effort” to improve services for protecting children in child abuse and neglect cases.¹⁸⁶ As West Virginia enters the twenty-first century it must continue to build upon these “improvements” in order to ensure that all children in West Virginia are able to live in safe, stable and permanent homes.

Morgan E. Persinger

¹⁸⁴ See *In re Carlita B.*, 408 S.E.2d 365 (W. Va. 1991).

¹⁸⁵ See Catherine Munster, *Child Maltreatment in West Virginia: The Comprehensive State Remediation Model and the Court Improvement Project*, 12 W. VA. LAW. 22 (Sept. 1998).

¹⁸⁶ See *id.*